>>> "Frank D. Eaman" <FDE@bellanca.com> 11/1/2006 5:30 PM >>>
Dear Clerk of the Court:

I write to comment on the proposed amendments to MCR 2.512, 2.513, 2.514, 2.515, 2.516 and 6.414. As a trial attorney for 35 years, I have tried lengthy and difficult trials in federal and state court. Some of the trials I have participated in have been high-profile cases that have garnered national and international attention. The longest trial I have participated in was four months, second longest three and a half months, and many other trials lasted three weeks or longer. Based on this experience, I am concerned about some of the suggested provisions.

First of all, it appears that some of these rules seem to combine a traditional jury trial with a summary jury trial, a method of trying a case that has been recognized in federal court. Although I have not participated in a summary jury trial, I am familiar with the concept. My concern, however, is that allowing summary jury trial provisions to creep into the rules in criminal cases is not appropriate and may impinge on due process rights of criminal defendants.

I am concerned about 2.513(D), Interim Commentary. The proposed rule creates an open-ended possibility of additional commentary throughout the trial with little or no regulation of what comments are appropriate and when that commentary could come. This rule may create a messy record, where attorneys seek to comment, objections are made, and the court is constantly ruling on appropriate comments. Prosecutors, ethically, are limited to any comments they can make on the record. This proposed rule, as abstract as it is, is misguided and more likely to create problems at a jury trial than it is to help a jury.

I am also concerned about several other proposed rules.

2.513(G), Scheduling Expert Testimony. First of all, almost 90% of criminal cases involve public defenders or appointed counsel. In those cases it is rare that the fee schedule permits defense attorneys to retain experts. The experts are usually the prosecutors' experts. Second, the concept of a panel discussion is more appropriate in a civil summary jury trial, not a criminal trial, and will likely lead to the strongest expert prevailing. The strongest expert is not always the right expert.

2.513(J) Jury View. This proposed rule permits the jury to request a scene view. However, the rule does not suggest how the jury requests such a view. In most cases tried today, the parties present photos or sufficient information so that a scene view is not necessary.

2.513(K) Juror Discussion. This proposed rule causes me the most concern. There are many valid reasons why jurors should not discuss the case until they begin deliberations. Any discussions earlier during the trial occur (1) without sufficient instructions on how to consider the evidence (2) without any knowledge of the quality of the evidence which will follow and (3) at a point so as to give a significant advantage to the party who goes forward first with the evidence-the plaintiff in a civil case and the prosecutor in a criminal case. I have spoken to many jurors after trials. Most times they are unsure how they are going to decide the case until all the evidence is complete, and they have heard final argument and instructions. Many times they admit to leaning one way or the other at the beginning and then changing their minds as the evidence is presented. Studies show that jurors who make up their minds early in the case as to which way they lean often fit all the evidence into their leanings, explaining away contradictory evidence and grasping at all evidence which supports their opinions. To allow discussions early in a trial will permit jurors to fix opinions, a procedure whereby jurors can lock into the wrong verdict early. This must not be permitted.

2.513(N)(2) Solicit Questions About Final Instructions. I am all for empowering jurors as part of the trial process, but to simply allow jurors to ask questions after instructions will create a process which could impede the submission of the case to the jury. Do they begin deliberations while the questions are pending? I had one trial where we discovered that not all of the evidence had been submitted to the jury. As we were preparing to submit the missing evidence, the jury rang a bell that indicated they had a verdict. The judge instructed them to consider the missing evidence and reconsider their verdict. Could that happen if the jurors' question about the instruction is unanswered and they return a verdict? In my experience, questions about instructions usually come after deliberations begin when their deliberations center around the meaning of the law. At that point, the jurors write a note to the judge asking for clarification of an instruction, or its application, and then, while the question is pending, deliberations are suspended. To allow for another procedure which automatically invites questions about the instructions at the beginning of deliberations will likely interfere with the deliberative process.

2.513(N)(4) Clarifying or Amplifying Final Instructions. This proposed rule undoubtedly infringes on the Sixth Amendment right to a jury trial. It places the judge in the position of mediating or arbitrating a jury which cannot reach a verdict. It permits the judge to direct the jury toward a verdict under the guise of "clarifying" or "amplifying" the instructions. It is an unnecessary rule. Impasses seldom have anything to do with the instructions, but most often have to do with the jurors' assessment of witnesses, view of the facts, or preconceived notions.

I would hope that the court would reject the proposals addressed in this letter. I am very concerned that these proposed rules infringe unduly on the Sixth Amendment right to a fair jury trial and rights to due process of the law.

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